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84-1758

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DURANTE BROS. AND SONS, INC.,

Petitioner,

—against—

FLUSHING NATIONAL BANK, JACK FARBER and RICHARD GELMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Whether the rule in criminal cases that consistency in jury verdicts "is not necessary," *Dunn v. United States*, 284 U.S. 390, 393 (1932), applies to civil cases, as the First and Ninth Circuits, and in certain cases the Second and Fifth Circuits, have held, or whether it is inapplicable as the Second Circuit (affirming the District Court) in this case, and other decisions in the Second, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits, have implicitly ruled.

Whether, if *Dunn* applies to inconsistent verdicts in civil cases, a court reviewing the sufficiency of the evidence supporting a verdict of liability should exclude evidence relating to the exonerating verdict, as the District Court did in the instant case.

Whether the Second Circuit's denial of a new trial is supportable when it directly conflicts with the decisions of the Sixth, Seventh, Tenth and Eleventh Circuits holding that inconsistent verdicts inherently reflect jury confusion, misconduct or abuse of power and mandate a new trial.[1]

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[1] **PARTIES TO THE PROCEEDING BELOW:**

Durante Bros. and Sons, Inc. ("Durante"), Flushing National Bank (the "Bank"), Jack Farber ("Farber") and Richard Gelman ("Gelman") were the parties to the proceeding in the court whose judgment is sought to be reviewed. Durante has an affiliate, Jaydur Equipment Corp. Petitioner believes that Flushing National Bank has changed its name to The First National Bank of New York City.

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DURANTE BROS. AND SONS, INC.,

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FLUSHING NATIONAL BANK, JACK FARBER and RICHARD GELMAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION

CITATION TO OPINIONS BELOW

The Second Circuit opinion dated February 5, 1985 is reported at 755 F.2d 239. The District Court opinion dated September 27, 1983 is reported at 571 F. Supp. 489. The District Court memorandum and order dated January 17, 1984 (A. 60) and its memorandum and order dated March 14, 1984 (A. 75) have not been reported.

JURISDICTION

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals, Second Circuit, dated and entered February 5, 1985. Jurisdiction of the United States Supreme Court to review this decision by writ of certiorari is conferred by Title 28, United States Code, § 1254(1).

STATUTES INVOLVED

Fed.R.Civ.P. 49 (28 U.S.C. § 49):

> (b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Fed.R.Civ.P. 50 (28 U.S.C. § 50):

> (b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made

at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the

judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

STATEMENT OF THE CASE

This action was commenced in 1980 in the District Court for the Eastern District of New York, 80 Civ. 1385. Durante's complaint asserted six counts alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.* (1982), and the Federal Banking Laws (12 U.S.C. § 1, *et seq.*), as well as eleven counts asserting state law claims including common law fraud.

Durante, a paving and excavation contractor, claimed that the Bank, Farber (the Bank's Chairman, Chief Executive Officer and controlling shareholder) and Gelman (the Bank's Executive Vice President) engaged in a scheme to economically entrap Durante: first by fraudulently promising to lend Durante substantial additional monies (beyond Durante's existing credit line) to enable Durante to purchase a parcel of real estate; and then, once Durante sought short-term interim financing by pledging its accounts receivable in reliance upon the Bank's promise, by refusing to lend the additional money, insisting upon a consolidated and excessive mortgage, completely encumbering Durante's real estate, requiring Durante to assume a third party's debt, and charging Durante excessive costs and usurious interest in connection with its loans.

Durante sought to prove that the Bank had a dual motive for its fraudulent manipulations. One aspect involved Jerder Realty Services, Inc. ("Jerder") in which Louis Durante, Sr. (father of the Durante stockholders) was a principal and in which Farber had obtained a substantial interest in consideration for his guarantee of a portion of an additional Bank loan

to Jerder. The other involved the Bank's concerns about potential action by the Comptroller of the Currency with respect to Jerder-related loans and concentrations of credit in the so-called "Durante" line (including loans to Durante, Louis Durante, Sr. and other affiliates). During the very same period when the Bank had been promising to lend Durante additional monies, the Comptroller of the Currency had leveled serious criticisms at the "Durante" line borrowings, making it virtually impossible for the Bank to lend Durante the additional monies it had promised.

The Bank was accused of victimizing Durante to recoup the Bank's and Farber's losses anticipated when Jerder experienced extreme financial difficulties, of shifting a Jerder-related obligation to Durante to alleviate Comptroller criticisms, and of forcing Durante into giving the Bank an excessive consolidated mortgage to improve the collateralization of the "Durante" line.

Prior to trial the District Court granted partial summary judgment to defendants, dismissing as time-barred claims asserting that defendants had engaged in collection of unlawful debts in violation of RICO 18 U.S.C. §§ 1962(a), (c) and (d), and that the individual defendants had caused the Bank to charge unlawful rates of interest in violation of 12 U.S.C. §§ 85 and 93. September 27, 1983 memorandum and order (A. 32), 571 F. Supp. 489.

At the outset of the trial, the court dismissed the claims of falsification of records and reports in violation of 12 U.S.C. § 161 and 18 U.S.C. §§ 1005 and 1014 (for Durante's lack of standing) and dismissed the state law usury claims as time-barred.

The trial on the remaining counts, including RICO racketeering, common law fraud, and seven other state law claims, lasted four weeks – from October 3 to October 31, 1983. At the close of the evidence, the court directed a verdict on all remaining claims except RICO racketeering, common law fraud by Farber, and fraud by the Bank.

The jury, after deliberating for two days, returned a verdict of $175,000 in favor of Durante against the Bank for fraud, a verdict in favor of the defendants as to RICO racketeering and in favor of Farber on the fraud count.

By January 17, 1984 memorandum and order (A. 60), the District Court granted the Bank's motion for judgment N.O.V., setting aside the jury verdict against the Bank for fraud. The court first expressed its own view of the case as "implausible" and "wholly unpersuasive" (A. 65) and then stated the issues as follows:

* * *

> ... The issue before the court is whether the verdict against the Bank can stand in the light of the verdict in favor of Farber. (A. 65)

* * *

> In the present case the verdict against the Bank may not stand unless at least there is clear and convincing proof that a false representation was made by a Bank officer or employee other than Farber to plaintiff, that the representation was knowingly false, and that plaintiff relied on the representation to its damage. (A. 66)

* * *

> The question thus is whether, taking all the evidence except Farber's alleged statements and construing it most favorably to plaintiff, there is proof justifying the unequivocal or unavoidable inference of fraud which the pertinent decisions require. (A. 68)

In response to Durante's citation of *Dunn v. United States*, 284 U.S. 390 (1932), the court stated:

> It is, of course, clear that the jury's verdict absolving Farber of fraud means that the verdict against the Bank cannot be justified on the basis of any representations made to plaintiff by him. (Citations omitted.) *Decisions approving inconsistent verdicts in criminal cases are plainly not in point.* (A. 67) (emphasis supplied)

By March 14, 1984 memorandum and order (A. 75), the court denied Durante's motion for a new trial, remarking that the jury's determination may have been "erroneous." (A. 76)

On appeal, the Second Circuit vacated the judgment insofar as it dismissed the RICO collection of unlawful debt claims as time barred, and remanded those counts for further proceedings. (A. 31) The court held that the proper statute of limitations applicable to RICO collection of unlawful debt is the three-year limitation for an action to enforce a liability on a statute, CPLR § 214(2) (McKinney's Supp. 1984), not the one-year usury limitation under CPLR § 215(6) that the lower court had applied. (A. 19-21) The court also ruled that the *Sedima* line of cases,[2] which require a prior criminal conviction and proof of racketeering injury for standing under the RICO racketeering provision, bars Durante's RICO racketeering claim, but does not apply to RICO collection of an unlawful debt. (A. 15-19) 755 F.2d 239.

The Second Circuit upheld the dismissal of Durante's banking law claims under 12 U.S.C. §§ 85 and 93, applying the two-year federal usury limitation found in 12 U.S.C. § 86, as the relevant federal statute of limitations, rather than looking to the most closely analogous state claim. (A. 8-10) The court also affirmed the dismissal of Durante's false reporting claims under 12 U.S.C. § 161 and 18 U.S.C. §§ 1005 and 1014 on the grounds that Durante's offer of proof of causation was insufficient. (A. 10-12)

The Second Circuit also upheld the grant of judgment N.O.V., implicitly affirming the lower court's rejection of *Dunn*. It adopted the trial court's approach of excluding the Farber evidence from its review of the evidence of fraud against the

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[2] *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 741 F.2d 482 (2d Cir. 1984), *cert. granted*, — U.S. — , 83 L.Ed.2d 917 (January 14, 1985); *Bankers Trust v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, 52 U.S.L.W. 2063 (U.S. Oct. 24, 1984); and *Furman v. Cirrito*, 741 F.2d 524 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 2063 (U.S. Oct. 15, 1984).

Bank on the ground that the jury must have found the evidence of fraud by Farber to be less than "clear and convincing." (A. 25-26) It agreed with the District Court's view that the bulk of the proof as to misrepresentation and reliance involved misrepresentations charged to Farber and that the remaining evidence, separately considered, was inadequate to support the claim of fraud against the Bank. (A. 26)

Furthermore, finding no error in the conduct of the trial which could have affected the jury's assessment of the case against Farber, the Court of Appeals found no abuse of the trial judge's discretion in the denial of a new trial, and no error in the dismissal of the other four state law claims (conspiracy, duress, breach of contract and negligent misrepresentation). (A. 26)

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO SETTLE INTRA-CIRCUIT AND INTER-CIRCUIT CONFLICTS OVER THE ISSUE OF WHETHER CONSISTENCY IN CIVIL JURY VERDICTS IS NECESSARY AND WHETHER THE SUFFICIENCY OF EVIDENCE OF A VERDICT OF LIABILITY SHOULD BE DETERMINED WITHOUT CONSIDERATION OF EVIDENCE NEGATED BY A FACIALLY INCONSISTENT EXONERATING VERDICT.

At issue here is whether, after a four-week trial and two days of jury deliberations, the function and province of the jury was improperly invaded by the grant of judgment in favor of the Bank notwithstanding the jury's verdict against it. Petitioner argued below that under *Dunn v. United States*, 284 U.S. 390 (1932), the seemingly inconsistent verdict in favor of Farber could not be the basis to set aside the verdict against the Bank.

In *Dunn*, Justice Holmes wrote:

> Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. (Citation omitted.) ... As was said in *Steckler v. United States*, (C.C.A.2d) 7 F.(2d) 59, 60:
>
> "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." 284 U.S. at 393.

The District Court expressly rejected the *Dunn* rule, stating that decisions in criminal cases are not in point. (A. 67-68) The court's rationale for setting the verdict aside was that the inconsistent verdict in favor of Farber necessarily meant that the jury found less than clear and convincing evidence of fraud by Farber, and therefore any evidence of Farber representations had to be excluded in determining the sufficiency of the evidence against the Bank. This approach was directly contrary to *Dunn*'s treatment of each count independently of the other and the recognition of the jury's prerogative to rule inconsistently as a matter of compromise or lenity.

The continued vitality of the *Dunn* rule in criminal cases, most recently underscored by the Supreme Court's ruling in *Harris v. Rivera*, 454 U.S. 339 (1981) (*Dunn* permits inconsistency in a state bench trial as well as in a criminal jury trial), is beyond question. However, while *Dunn* may have settled a prior conflict among Circuit Courts as to the effect of an inconsistent verdict in criminal cases, *see Boyle v. United States*, 22 F.2d 547 (8th Cir. 1927), the applicability of *Dunn* to civil cases remains uncertain.

The maintenance of the sanctity of jury deliberations in civil cases has been of primary importance to this Court. *Tennant v. Peoria & Pekin Union Railway Company*, 321 U.S. 29 (1944);

Gallick v. Baltimore & Ohio Railroad Company, 372 U.S. 108 (1963). Consequently the extent to which a trial court can usurp the jury's function by determining what it believes the jury decided is of great significance to the proper administration of civil jury trials. In this case, the express rejection of *Dunn*'s applicability to civil cases has clearly framed the issue.

The First Circuit in *Merchant v. Ruhle*, 740 F.2d 86, 89-91 (1984), is the only court that has directly addressed the applicability of *Dunn* to civil cases. After reviewing *Harris v. Rivera, supra*, and a line of civil cases in the Second Circuit appearing to approve *Dunn*,[3] the First Circuit opted in favor of applying *Dunn* to civil cases, but noted that the applicability of Dunn to civil cases was "less categorically established" than in criminal cases. 740 F.2d at 89.

Rulings in the Second Circuit are inconsistent. *Quinby v. Morrow*, 340 F.2d 584 (2d Cir. 1965), seems to sanction the method the trial court employed in excluding the evidence purportedly negated by the exonerating verdict in its review of the evidence. But *Quinby* and the case at bar run contrary to the Second Circuit cases relied upon in *Merchant v. Ruhle, supra*, as well as the strong policy considerations against invasion of the jury's province expressed by the Second Circuit in criminal cases, *see, e.g., United States v. Zane*, 495 F.2d 683 (2d Cir. 1974), *cert. denied*, 419 U.S. 895 (1974), and the Second Circuit's clear statement in *Globus v. Law Research Service, Inc.*, 418 F.2d 1276, 1290, n. 17 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970), that consistent jury verdicts are not, in themselves, necessary attributes of a valid judgment in civil cases.

The Fifth Circuit has reached inconsistent results on this issue. In earlier master/servant cases, the Fifth Circuit held that a finding solely against the master and exonerating the servant, "[w]hether ... inconsistent, incomplete, self-contradictory, repugnant, or all of these, ... should be set aside and a new trial

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[3] *Jayne v. Mason & Dixon Lines*, 124 F.2d 317 (2d Cir. 1941); *Malm v. United States Lines Company*, 269 F. Supp. 731 (S.D.N.Y. 1967), *aff'd*, 378 F.2d 941 (2d Cir. 1967); *Henry v. A/S Ocean*, 512 F.2d 401 (2d Cir. 1975).

ordered." *Barnes v. West Point Foundry and Machine Company, Inc.*, 441 F.2d 532, 533 (5th Cir. 1971); *Dixie Ohio Express Co. v. Poston*, 170 F.2d 446 (5th Cir. 1948). But in a recent product liability case, the Fifth Circuit stated:

> This inconsistency in the jury's verdicts, although puzzling, need not detain us. It has long been the rule that consistency in general verdicts is not required. *Dunn v. United States*, 1932, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356. "Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty ... is immaterial. Juries may indulge in precisely such motives or vagaries." *United States v. Dotterweich*, 1943, 320 U.S. 277, 279, 64 S.Ct. 134, 135, 88 L.Ed. 48....

Jackson v. Johns-Manville Sales Corporation, 727 F.2d 506, 524 (5th Cir. 1984).

The Ninth Circuit has adhered to *Dunn* in a civil case. *International Longshoremen's & Warehousemen's Union v. Hawaiian Pineapple Company, Ltd.*, 226 F.2d 875, 882 (9th Cir. 1955), *cert. denied*, 351 U.S. 963 (1956).

The District of Columbia Circuit, apparently disregarding *Dunn*, excluded evidence against an exonerated servant/doctor in determining the sufficiency of the evidence of liability against the master/hospital. *Stivers v. George Washington University*, 320 F.2d 751 (D.C. Cir. 1963).

Four other circuits have held that inconsistency in verdicts is absolutely fatal to the verdict of liability. *Hopkins v. Coen*, 431 F.2d 1055 (6th Cir. 1970); *Stone v. City of Chicago*, 738 F.2d 896 (7th Cir. 1984); *Global Van Lines, Inc. v. Nebeker*, 541 F.2d 865 (10th Cir. 1976); *Witt v. Norfe, Inc.*, 725 F.2d 1277 (11th Cir. 1984)*

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* These cases continue to hold that a new trial must be granted. See II, *infra*.

The *Dunn* rule should be applied in civil cases. The Second Circuit itself has recognized that *Dunn* goes beyond the jury's right to compromise or to be lenient, stating that:

> ... the rule against disturbing inconsistent verdicts runs deeper than the principle of compromise. The validity accorded to such verdicts recognizes the sanctity of the jury's deliberations and the strong policy against probing into its logic or reasoning, which would open the door to interminable speculation. *United States v. Zane*, *supra* at 690.

The right to return inconsistent verdicts is as important an attribute in civil cases as it is in criminal cases. 3 C. Wright, *Federal Practice and Procedure*, § 514, at 18, n. 8 (1982), characterizing the view of Professor Alexander Bickel stated in *Judge and Jury — Inconsistent Verdicts in the Federal Courts*, 63 Harv. L. Rev. 649 (1950).

The exclusion of the Farber representations in determining the adequacy of the evidence of fraud against the Bank is equivalent, in criminal cases, to excluding facts necessarily determined upon acquittal on one count in evaluating the sufficiency of the evidence of conviction on any other count. This approach has been repeatedly and consistently rejected. "... [A]n acquittal is not necessarily to be taken as the equivalent of a factual finding of innocence; nor does it necessarily reflect a failure of proof on the part of the prosecution." *United States v. Price*, 750 F.2d 363, 365 (5th Cir. 1985), citing *United States v. Espinosa-Cerpa*, 630 F.2d 328 (5th Cir. 1980). The court "may consider evidence on a count on which the jury acquitted." *United States v. Mespoulede*, 597 F.2d 329, 336, n. 12 (2d Cir. 1979).

Dunn requires that all of the evidence including that evidence relevant to the exonerating verdict must be reviewed in the light most favorable to the verdict of guilt or liability. *See United States v. Smallwood*, 443 F.2d 535 (8th Cir. 1971), *cert. denied*, 404 U.S. 853 (1971). "The legal sufficiency of the evidence to support each verdict must be determined without reference to

the other." *Canaday v. United States*, 354 F.2d 849, 856 (8th Cir. 1966), quoting *Bryson v. United States*, 238 F.2d 657, 663 (9th Cir. 1956), *cert. denied* 355 U.S. 817 (1957). Therefore, the verdict in favor of Farber should not have been considered at all, and all of the Farber evidence should have been taken into consideration, in the evaluation of the verdict against the Bank. The trial court and the appellate court contravened the decision in *Dunn* when it excluded the Farber evidence from their examination of the evidence.

In any event, the trial and appellate courts' selective excision of Farber evidence was inappropriate and illogical. The proof of fraud was inextricably interrelated, involving various circumstances and numerous different actions and representations by various Bank officers and employees. The jury had the right to consider the Farber actions and representations as having supplied at least partial proof of fraud by the Bank even if they did not, independently, establish Farber's individual liability.[5]

Moreover, the trial court's completely unsupported comments that the case was "implausible" and "wholly unpersuasive" (A. 65) cannot be taken to mean that there was insufficient evidence even if the Farber representations were included.[6] The court was required to view the evidence in the light most favorable to Durante with all permissible inferences drawn in its favor.

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[5] Even under the line of cases overruled by *Dunn* (*see, e.g., John Hohenadel Brewing Co. v. United States*, 295 F. 489 (3d Cir. 1924); *Peru v. United States*, 4 F.2d 881 (8th Cir. 1925); *Murphy v. United States*, 18 F.2d 509 (8th Cir. 1927), only the facts which the jury *necessarily* found not proved in reaching its verdict of acquittal are to be excluded in determining the sufficiency of the evidence. *See Dunn v. United States*, dissenting opinion, 284 U.S. 406-07. Since fraud has five elements (falsity, materiality, *scienter*, reliance and injury), it is impossible, without special verdicts, to determine what facts the jury determined had not been proven. The District Court engaged in pure speculation when it negated all facts relating to representations by Farber. This was just what the *Dunn* rule was designed to prevent.

[6] The court did not decide defendants' motion for a directed verdict, as to which it had reserved decision.

Saloomey v. Jeppesen & Co., 707 F.2d 671, 677 (2d Cir. 1983). Neither the trial court nor the appellate court detailed their examination of the evidence. Rather, the District Court expressed its personal view of the case, a view which supports Durante's contention that the court wrongly substituted its own judgment for that of the jury.

The conflicts within and among the Circuits as to whether *Dunn* applies to civil cases, and the importance of the issue to the consistent supervision, and maintenance of the integrity, of the jury system, provide compelling reasons for granting *certiorari*.

II.

CERTIORARI IS NEEDED TO DETERMINE UNDER WHAT CIRCUMSTANCES A NEW TRIAL IS TO BE GRANTED WHEN INCONSISTENT VERDICTS IN CIVIL CASES HAVE BEEN RENDERED, THEREBY RESOLVING A CONFLICT BETWEEN CIRCUIT COURTS HOLDING A NEW TRIAL TO BE MANDATORY AND THOSE FINDING IT PURELY DISCRETIONARY.

Petitioner contends that if the *Dunn* rule does not compel reinstatement of the verdict against the Bank, the inconsistent verdicts against the Bank and in favor of Farber on the fraud claims are, *ipso facto*, an indication of jury confusion or abuse of power which requires a new trial.

Indeed, the Second Circuit's affirmance of the District Court's denial of a new trial conflicts with decisions in the Fifth, Sixth, Seventh, Tenth and Eleventh Circuits unequivocally holding that "where verdicts in the same case are inconsistent on their faces, indicating that the jury was either in a state of confusion or abused its power, a motion to alter or amend a judgment, for new trial, or relief from the judgment, if timely made, is not discretionary." *Hopkins v. Coen, supra* (6th Cir.); *see also Barnes v. West Point Foundary and Machine Company, Inc., supra* (5th Cir.); *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975); *Dixie Ohio Express Co. v. Poston, supra* (5th Cir.);

Stone v. City of Chicago, supra (7th Cir.); *Global Van Lines, Inc. v. Nebeker, supra* (10th Cir.); *Cheney v. Moler*, 285 F.2d 116 (10th Cir. 1960); *Witt v. Norfe, Inc., supra* (11th Cir.); 6A J. Moore, J. Lucas & G. Grotheer, Jr., *Moore's Federal Practice*, ¶ 59.08[4] (2d Ed. 1984).

As the Second Circuit stated in this case, a court normally has broad discretion as to whether to grant a new trial on a motion for judgment notwithstanding the verdict. But the above-cited cases from five other circuits state an exception to the general rule on the grounds that inconsistent verdicts are unauthorized, repugnant or evidence of jury confusion, misconduct or abuse of power and mandate a new trial. Other courts have routinely granted a new trial, apparently exercising their discretion to do so. Petitioner has not found any "inconsistent verdict" cases in the procedural posture of this case where a new trial has not been granted.

If inconsistent verdicts inherently manifest jury confusion or misapprehension, then Fed.R.Civ.P. 49(b), which deals in part with inconsistent special verdicts, should be invoked. It dictates that when special verdicts are inconsistent the court must either return the jury for further consideration of its verdict or order a new trial. 28 U.S.C. § 49(b). Although there is no statutory provision requiring that an inconsistent general verdict be reconsidered or a new trial be granted, it would be logical to apply the same rule to both general and special verdicts where jury confusion or misapprehension is manifest.

If a new trial is not mandatory when inconsistent verdicts have been rendered, then a court should be required to review whatever factors may have existed which might have prompted the jury to reach an aberrant result. Those factors may include the length of the trial, the complexity of the issues with which the jury had to contend, the charge to the jury, the questions propounded by the jury during its deliberations, the possibility of a compromise verdict, etc. *See, e.g., Ajax Hardware Manufacturing Corporation v. Industrial Plants Corporation*, 569 F.2d 181 (2d Cir. 1977); *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3d Cir. 1960).

Neither the District Court nor the Second Circuit considered such factors in this case. The District Court merely said that the jury may have acted "erroneously." The Second Circuit explained that there was no error in the conduct of the trial which might justify affording plaintiff a second opportunity to prove its claim. There was no discussion as to whether there was, or might have been, jury confusion, misconduct or abuse of power. The trial judge substituted his judgment for that of the jury and nevertheless denied Durante a new trial. Such a result denigrates the jury system.

The authorities conflict as to whether the trial court has discretion, or is required, to grant a new trial where inconsistent verdicts have been rendered. Determination of this issue is necessary to establish consistent federal standards for judicial review of jury verdicts.

CONCLUSION

The applicability of *Dunn v. United States* to civil cases, and the circumstances under which a new trial should be granted where inconsistent verdicts have been rendered, are issues which have not been settled and which are significant to the proper functioning of the jury system. For these reasons, *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 23 — August Term, 1984

(Argued: September 12, 1984 Decided: February 5, 1985)

(Final briefs submitted: October 1, 1984)

Docket No. 84-7221

DURANTE BROS. AND SONS, INC.,

Plaintiff-Appellant,

—v.—

FLUSHING NATIONAL BANK, JACK FARBER and RICHARD GELMAN,

Defendants-Appellees.

Before:

LUMBARD, MANSFIELD, and KEARSE, *Circuit Judges.*

Appeal from final judgment of the United States District Court for the Eastern District of New York, entered following a jury trial before Eugene H. Nickerson, *Judge*, and from interlocutory rulings dismissing certain claims under the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, and the federal banking laws, 12 U.S.C. § 1, *et seq.*, as barred by statutes of limitations or as unproven.

Affirmed in part, vacated and remanded in part.

MYRON BELDOCK, New York, New York (Jon B. Levison, Edward S. Graves, Beldock Levine & Hoffman, New York, New York, on the brief), *for Plaintiff-Appellant.*

MILTON S. GOULD, New York, New York (Fran M. Jacobs, Peter C. Neger, Shea & Gould, New York, New York, on the brief), *for Defendants-Appellees.*

KEARSE, *Circuit Judge*:

Plaintiff Durante Bros. and Sons, Inc. ("Durante"), appeals from a final judgment of the United States District Court for the Eastern District of New York, Eugene H. Nickerson, *Judge*, entered after a jury trial, dismissing its complaint against defendants Flushing National Bank ("Flushing" or the "Bank"), Jack Farber, and Richard Gelman, alleging violations of, *inter alia*, the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.* (1982), and the federal banking laws, 12 U.S.C. § 1, *et seq.* (1982). The district court granted summary judgment dismissing certain of the RICO and banking law claims on the grounds that they were barred by statutes of limitations; it directed a verdict as to certain other claims for lack of proof; and it set aside a jury verdict against Flushing for fraud, on the ground that that verdict was unsupportable in light of the jury's verdict in favor of Farber on essentially the same claim of fraud. On appeal, Durante contends principally that the district court applied the incorrect statutes of limitations and that it erred in dismissing Durante's other claims for failure of proof and for inconsistency in the jury's verdicts. We find merit only in

the contention that the court erred in dismissing the RICO claims on statute of limitations grounds, and we vacate the judgment dismissing counts 1, 3, and 5 of the complaint and remand for further proceedings on those claims.

I. Background

A. *The Complaint*

The action, commenced on May 21, 1980, centers on certain loans made by Flushing from 1974 through 1976 to (1) Durante, (2) Louis Durante, Sr. ("Louis Sr."), father of Durante's sole stockholder, and (3) Jerder Realty Services, Inc. ("Jerder"), a real estate development company of which Louis Sr. was a principal. As set forth in somewhat greater detail in the discussion sections below, the amended complaint ("complaint") alleged that as the Bank's loans to Jerder soured, the Bank, Farber (its chairman, chief executive officer, and controlling shareholder), and Gelman (its executive vice president) conspired to offset Flushing's anticipated losses by causing the Bank to make loans to Durante at usurious rates of interest.

The complaint contained six counts (1-6) asserting federal claims and eleven counts (7-17) asserting state law claims. The federal law claims included the assertions that various actions by the defendants constituted the collection of unlawful debts, in violation of RICO, 18 U.S.C. §§ 1962(a), (c), and (d) (counts 1, 3, and 5); that defendants caused Flushing to charge unlawful rates of interest on the loans, in violation of 12 U.S.C. § 85, and to falsify its records and its reports to regulatory agencies, in violation of 12 U.S.C. § 161 and 18 U.S.C. §§ 1005 and 1014 (1982) (counts 2 and 4); and that in

mailing monthly bank statements and a letter to Durante, defendants repeatedly violated the mail fraud statute, 18 U.S.C. § 1341 (1982), and thereby engaged in a pattern of racketeering activity, in violation of RICO, 18 U.S.C. §§ 1962(a), (c), and (d) (count 6).

B. *The Pretrial Rulings*

Prior to trial, defendants moved to dismiss the six federal counts. They contended that counts 1, 3, and 5 were barred by the one-year statute of limitations found in N.Y. Civ. Prac. Law ("CPLR") § 215(6) (McKinney 1972 & Supp. 1983-1984) and that counts 2 and 4 either were barred by the two-year statute of limitations provided by 12 U.S.C. § 86 or were brought under provisions that gave Durante no standing to sue. They contended that count 6 failed to state a claim upon which relief may be granted under RICO because the alleged mailings were not for the purpose of furthering the alleged scheme and hence did not violate the mail fraud statute, and therefore count 6 did not allege valid predicate acts upon which liability for "racketeering activity" could be premised. The district court granted the motions to dismiss as to counts 1 through 5, but denied the motion as to count 6.

In a memorandum and order dated September 27, 1983, reported at 571 F. Supp. 489 (E.D.N.Y. 1983), the court upheld the defendants' statute of limitations defenses and deferred decision on the issue of standing. With regard to RICO counts 1, 3, and 5, which asserted that defendants had engaged in the collection of unlawful debts, the court noted that RICO itself contains no statute of limitations provisions, and it therefore sought the most appropriate state statute of limitations. On the

premise that an action based on the collection of an unlawful debt was most like a state law action for usury, the court concluded that the appropriate statute of limitations was that found in CPLR § 215(6), which provides that actions to recover any overcharge of interest or to enforce a penalty for such an overcharge must be commenced within one year of the accrual of the cause of action. Since suit had been commenced some 2½ years after the last alleged interest overpayment was made, the court found counts 1, 3, and 5 barred.

The court rejected defendants' contention that count 6 of the complaint failed to state a claim under RICO. It ruled that the matter of whether or not the mailings of bank statements and letters were "for the purpose of executing" the alleged scheme was a question of fact that could not be decided on a motion for summary judgment.

As to counts 2 and 4, the court held that the portions of those counts that claimed that Durante had been charged an unlawful rate of interest in violation of 12 U.S.C. § 85 were analogous to a claim to recover damages arising out of the payment of usurious interest, and it therefore applied the one-year statute of limitations found in § 215(6). As to the portions of counts 2 and 4 that asserted that defendants' falsification of records and reports violated 12 U.S.C. § 161 and 18 U.S.C. §§ 1005 and 1014, the court deferred its ruling on defendants' contention that Durante had no standing to complain of such acts, observing that the papers before it did not indicate that there was any causal connection between the alleged falsifications and the injury complained of. The court stated that it would rule on the motion to dismiss these claims after Durante had made an offer of proof as to causation.

On October 3, 1983, just prior to the start of trial, the court held a hearing to permit Durante to make its offer of proof. Finding the offer insufficient, the court dismissed the remainder of counts 2 and 4. In addition, the court dismissed counts 10, 11, and 13 as state law usury claims barred by the statute of limitations, CPLR § 215(6).

C. *Trial, the Directed Verdicts, and Judgment NOV*

The parties proceeded to trial on the remaining counts of the complaint. At the close of the evidence, the court directed a verdict for the defendants on counts 7 (conspiracy), 12 (duress), 14 (breach of fiduciary duty), 15 (negligence), 16 (breach of contract), and 17 (negligent misrepresentation). The only counts submitted to the jury were counts 6 (RICO racketeering), 8 (fraud by Farber), and 9 (fraud by the Bank).

The jury, after deliberating for two days, returned a verdict in favor of the defendants on count 6, a verdict in favor of Farber on count 8, and a verdict of $175,000 in favor of Durante against the Bank on count 9. Flushing moved for judgment notwithstanding the verdict against it or for a new trial. By a memorandum and order dated January 17, 1984, the court set aside the verdict on the ground that it was unsupportable in light of the jury's conclusion that Durante had failed to prove fraud on the part of Farber. The court declined to order a new trial, and judgment was entered in favor of defendants, dismissing the complaint in its entirety.

D. *Issues on Appeal*

On this appeal, Durante contends principally (1) that the court applied the wrong statutes of limitations in dis-

missing the RICO claims asserted in counts 1, 3, and 5 of the complaint and the banking claims under 12 U.S.C. § 93 asserted in counts 2 and 4; (2) that the court erred in dismissing the remainder of counts 2 and 4 for lack of causation; (3) that the jury's verdict against the Bank on count 9 was not inconsistant with its verdict in favor of Farber on count 8, but that if there was an inconsistency, it did not warrant entry of judgment notwithstanding the verdict ("judgment NOV") but only the granting of a new trial; and (4) that there was sufficient evidence supporting counts 7, 12, 16, and 17 to require their submission to the jury. In addition, Durante asserts various claims of error in the court's evidentiary rulings and instructions to the jury. It asks that we remand for a new trial of all counts except counts 10, 11, and 13, or alternatively that we reinstate the verdict against the Bank on count 9.

We find merit only in the contention that the court applied the wrong statute of limitations to the RICO claims asserted in counts 1, 3, and 5. Accordingly, the judgment dismissing those counts is vacated and the matter is remanded for further proceedings as set forth below.

II. The Banking Law Claims

In counts 2 and 4, Durante claimed that Farber and Gelman (A) violated the federal banking laws by causing Flushing to charge more than the lawful rate of interest allowed under 12 U.S.C. § 85, and (B) caused the Bank to make false reports to banking authorities in violation of 12 U.S.C. § 161 and 18 U.S.C. §§ 1005 and 1014. We conclude that insofar as these counts were grounded in the alleged violation of § 85, they were time-barred; inso-

far as they were based on the other claimed violations, they were properly dismissed for lack of any showing of causation between the alleged violation and the claimed injury to Durante.

A. *Statute of Limitations*

Section 85 of 12 U.S.C., through reference to state laws and Federal Reserve Bank rates, sets a ceiling on the rate of interest that a national bank may charge. Section 86 of 12 U.S.C. allows an individual who has paid interest at a rate in excess of that allowed under § 85 to bring an action to recover from the bank twice the amount of interest paid. Defendants contend that § 86's action to recover double interest is the exclusive remedy for a violation of § 85, and they point out that § 86 provides that such an action must be commenced within two years of the occurrence of the usurious transaction. Since the present action was commenced some 2½ years after Durante made its last payment of allegedly usurious interest, Durante argues that counts 2 and 4 should be deemed brought under 12 U.S.C. § 93, which provides that any person may sue the director of a national bank for damages sustained in consequence of a knowing violation of the federal banking laws. Since Title 12 contains no provision specifying a statute of limitations with respect to an action brought under § 93, Durante contends that the appropriate state statute of limitations was the three-year period provided by CPLR § 214(2) (McKinney Supp. 1983-1984) for actions brought to enforce a liability created by statute.

The district court found it unnecessary to determine whether § 86 provides the exclusive remedy for a violation of § 85, since it concluded that even if counts 2 and

4 were deemed brought under § 93, they were, to the extent that they relied on the claimed violation of § 85, time-barred because the most analogous state statute of limitations was the one-year period provided by CPLR § 215(6) for claims of usury. Though we disagree with the court's application of the CPLR, we too find it unnecessary to determine the exclusiveness of the remedy provided by § 86, since we conclude that even in a suit brought under § 93, the time within which a claim dependent on a violation of § 85 must be brought is governed by 12 U.S.C. § 86.

Where Congress has created a private right of action but has not specifically stated the time within which the action may be brought, the court must seek out the most appropriate statute of limitations. In so doing, it should look first to federal law for a relevant limitations provision, turning to state law only if there is no relevant federal period. *See Board of Regents* v. *Tomanio*, 446 U.S. 478, 485 (1980) (appropriate state period applied "*since there was no* specifically stated or *otherwise relevant federal statute of limitations* for the federal substantive claim created by Congress" (emphasis added)); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462 (1975) (same).

In the present action, the basis for the § 93 claim is solely that the individual defendants knowingly violated § 85. While Durante's *ad damnum* seeks more than the amount that would be recoverable under § 86, it is nevertheless clear that its § 93 claim "aris[es] from the charging of excessive interest" in violation of § 85. (Durante brief on appeal at 25.) Since Congress has specified in § 86 the period within which the actions there authorized to redress violations of § 85 may be brought, the period

provided by § 86 must be considered relevant to any claim that is based solely on a violation of § 85.

We conclude, therefore, that, to the extent that counts 2 and 4 were brought under 12 U.S.C. § 93 to redress a violation of § 85, the district court should have applied the two-year limitations period found in 12 U.S.C. § 86. Since the action was not commenced within two years of the allegedly usurious transaction, those portions of counts 2 and 4 were, however, properly dismissed.

B. *Causation*

The other statutes relied on in counts 2 and 4 were 12 U.S.C. § 161, which requires national banks to make reports to the Comptroller of the Currency setting forth their resources and liabilities; 18 U.S.C. § 1005, which prohibits the making of false entries in the books, reports, or statements of a national bank with intent to defraud; and 18 U.S.C. § 1014, which prohibits the knowing making of a false statement or report for the purpose of influencing action on a loan by certain federal agencies. Section 503 of 12 U.S.C. provides that any individual officer or director of a national bank who knowingly violates or permits the violation of, *inter alia*, 18 U.S.C. §§ 1005 and 1014 may be held personally liable to any person who sustained injuries "in consequence of such violation." 12 U.S.C. § 503 (1982).

Durante's theory was that in 1975, Jerder needed more funds; that the Bank had surpassed the legal limit on the amount it could lend Jerder; and that the Bank therefore loaned money to Louis Sr., which would be used by Jerder. Durante asserted that as part of their scheme, and to ensure the collectability of the loan to Louis Sr.,

defendants falsely promised in the fall of 1975 that the Bank would lend Durante $100,000, in addition to amounts already loaned to it, and thereafter refused to fulfill the promise unless Durante would give the Bank a mortgage in an amount that covered not only Durante's indebtedness but also that of Louis Sr. Durante claimed to have been injured by the Bank's promise because on the basis of that promise, Durante had committed itself to purchase certain property; the Bank's subsequently imposed condition meant that Durante would be forced either to forgo the loan, and thereby be overextended because of the commitment to purchase the property, or to undertake repayment of Louis Sr.'s loan and be overextended because of that obligation. Durante accepted the loan, gave Flushing a mortgage in 1976 covering its own and Louis Sr.'s indebtedness, and made interest payments on the total amount until December 1977. It made no payments thereafter, and in April 1978, the Bank commenced foreclosure proceedings. The district court asked Durante to make an offer of proof as to its contention that defendants' violations of the reporting statutes were the cause of its claimed injuiry.

Durante offered to prove that the Bank's reports to the Comptroller of the Currency did not reveal that the loan to Louis Sr. was really for the use of Jerder. It argued that had the reports revealed that fact, the Comptroller would not have permitted the situation to continue, perhaps even dissolving the Bank, and the Bank thus would not have been able in the fall of 1975 to represent falsely to Durante that it would lend Durante $100,000, thereby causing the latter to overextend itself and be vulnerable to the Bank's demand for an excessive mortgage.

The district court properly rejected Durante's offer of proof on the ground that it provided no indication that the claimed injury was caused by the alleged false reporting. Although "the provisions of [Title 12] requiring periodic examinations and reports and the powers of the Comptroller are designed to insure prompt discovery of violations of the [federal banking laws] and in that event prompt remedial action by the Comptroller," *Dietrick* v. *Greaney*, 309 U.S. 190, 195 (1940), we agree with the district court that Durante showed no basis for its assertion that truthful reporting by Flushing would have led the Comptroller to dissolve the Bank or to take other action that would have prevented Flushing's promising to lend funds to Durante. Although Durante's counsel suggested that he might soon have documents indicating that "apparently there were instances where the comptroller did that type of thing," no such proof was offered and there was no suggestion that Durante would call any witness from the office of the Comptroller to testify that reports reflecting the facts as Durante alleged them would have led to any particular action by the Comptroller. In the circumstances, Durante's claim that the alleged violations of §§ 161, 1005, and 1014 caused its injuries was entirely speculative. These portions of counts 2 and 4 were properly dismissed.

III. The RICO Claims

Durante's claim that it is entitled to pursue various counts asserting claims under RICO presents greater difficulties. Counts 1, 3, and 5 asserted that defendants had engaged in the collection of unlawful debt; count 6 alleged that defendants had engaged in a pattern of racketeering activity. As a preliminary matter, we must determine what effect our recent trilogy of decisions in

Sedima, S.P.R.L. v. *Imrex Co.*, 741 F.2d 482 (2d Cir. 1984) (*"Sedima"*), *cert. granted*, 53 U.S.L.W. — (U.S. Jan. 14, 1985); *Bankers Trust* v. *Rhoades*, 741 F.2d 511 (2d Cir. 1984) (*"Bankers Trust"*), *petition for cert. filed*, 53 U.S.L.W. 2063 (U.S. Oct. 24, 1984); and *Furman* v. *Cirrito*, 741 F.2d 524 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 2063 (U.S. Oct. 15, 1984), has on the right of Durante to maintain each of these claims.

We conclude that, in light of the *Sedima* trilogy, Durante's count 6 failed to state a claim upon which relief could be granted. Counts 1, 3, and 5, however, are unaffected by the *Sedima* trilogy, and we conclude that those counts were not time-barred.

A. *The Effect of the* Sedima *Trilogy*

RICO grants a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c) ("civil RICO"). Section 1962 makes it unlawful, *inter alia,* (1) to use "income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt," in the operation of any enterprise whose activities affect interstate commerce, 18 U.S.C. § 1962(a); or (2) to participate, as a person employed by or associated with an enterprise whose activities affect interstate commerce, in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt, *id.* § 1962(c); or (3) to conspire to violate the foregoing provisions, *id.* § 1962(d).

"[E]nterprise" is defined to "include[ ] any individual, partnership, corporation, association, or other

legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961 (4). "[R]acketeering activity" is defined to mean any of a number of specified acts that would constitute certain state or federal crimes, *id.* § 1961(1); and a "pattern of racketeering activity" is defined to require at least two acts of racketeering activity within a ten-year period, *id.* § 1961(5). "[U]nlawful debt" is defined, in pertinent part, as follows:

> "unlawful debt" means a debt (A) . . . which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with . . . the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

Id. § 1961(6).

The *Sedima* trilogy analyzed the requirements for an action under civil RICO. *Bankers Trust* focused on § 1964(c)'s restriction of the right of private action to persons injured "by reason of a violation of section 1962," and recognized that violation of the latter section encompasses a number of factors, including, under the complaint filed in that case, a pattern of racketeering activity. *Bankers Trust* held, therefore, that the plaintiff must establish that the injury complained of was caused by the pattern of racketeering activity, and that it was not sufficient to show that the injury resulted from the individual predicate acts, even if those acts constituted a pattern of racketeering activity. *Sedima* likewise held that a complaint that alleges injury resulting only from the predicate acts rather than from the pattern does not

state a claim under civil RICO. In addition, for reasons described in greater detail in Part III.A.2. below, *Sedima* ruled that a civil action under RICO based on a pattern of racketeering activity may not be maintained in the absence of criminal convictions on the predicate acts that constitute the pattern. The panel in *Furman* v. *Cirrito*, though disagreeing with both grounds of the *Sedima* decision, adhered to the law of the Circuit as established by *Sedima* and *Bankers Trust*.

1. *Count 6*

The direct application of the *Sedima* trilogy to the present case is limited, for none of those cases involved or purported to deal with a claim based on the alleged collection of an unlawful debt. *See, e.g., Bankers Trust*, 741 F.2d at 515 n.3. In the present case, only count 6 alleged that the defendants had engaged in a pattern of racketeering activity. Although the jury found against Durante on that count, we nevertheless address count 6 in light of *Sedima et al.* since Durante has asked that a new trial include count 6.

The rule established by *Sedima* and *Bankers Trust*, that the complaint must allege injury resulting from the *pattern* of racketeering activity, eliminates count 6 of the Durante complaint. Count 6 asserted that the pattern of racketeering activity consisted principally of defendants' mailing from January 1976 through February 1978 of monthly statements as to the status of Durante's account. Plainly the injuries claimed by Durante, *i.e.*, the 1975 overextension in committing to purchase property or its later payment of excessive interest, could not have been the result of the pattern of the Bank's sending monthly account statements. Nor did count 6 satisfy *Sedima's* re-

quirement that the defendants have been convicted of the underlying predicate acts. Accordingly, we affirm the dismissal of count 6.

2. *Counts 1, 3, and 5*

Sedima's ruling that in order to succeed in a civil RICO case the plaintiff must show that the defendants have been convicted of the predicate acts that constitute the alleged racketeering activity seems to have little application to counts 1, 3, and 5 of the present complaint, which do not assert that there was any racketeering activity but only that the defendants engaged in the collection of a usurious "unlawful debt." We see no basis for extending the conviction requirement to the latter type of civil RICO action.

The *Sedima* ruling was based largely on the language used by Congress to define racketeering activity. Section 1961(1) defines racketeering activity in terms of "offenses," "indictable acts," and acts "chargeable under State law and punishable by imprisonment for more than one year." The *Sedima* panel reasoned that these specifications implied that an act was not racketeering activity unless it was a criminal offense. The panel further noted that the establishment of a criminal offense requires proof beyond a reasonable doubt; that Congress apparently assumed that the quantum of proof required in a civil RICO action would be the normal preponderance; and that a jury would experience inordinate difficulty in applying these two quanta of proof to different elements of a single case. *Sedima* concluded that the reconciliation of these factors required the inference that Congress intended that, in a civil RICO action, the plaintiff must prove that the defendants had already been convicted of

the crimes constituting the predicate acts. 741 F.2d at 499-503. For two reasons we conclude that this reasoning is not applicable to a civil RICO claim based on collection of a debt characterized in § 1961(6) as unlawful because of its usurious nature.

First, unlike § 1961(1)'s definition of racketeering activity, § 1961(6)'s definition of unlawful debt does not refer either to "offenses" or to acts that are "indictable," "chargeable," or "punishable." Nor, insofar as is pertinent here, does it refer to conduct that is unlawful. To the extent that the definition focuses on usurious transactions (as contrasted with its concern with "gambling activity . . . in violation of the law"), it refers to debt that is merely "*unenforceable* under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury." 18 U.S.C. § 1961(6) (emphasis added). The absence of any reference to unlawful, indictable, or punishable acts removes any suggestion (1) that criminal activity need be proven, or (2) that the usurious character of the debt—or any other element of the claim—need be proven by other than a preponderance of the evidence. In the circumstances, there is no basis for inferring that success on a civil RICO claim based on the collection of a usurious debt requires proof of a prior conviction of the defendants for usury.

Second, the final requirement of § 1961(6) strongly indicates that a requirement of proof of a prior conviction was not intended. Under § 1961(6), assuming all of the other criteria of the section are met (*see* below), a usurious debt is an "unlawful debt" where the usurious rate "is at least twice the enforceable rate." This definition includes debts that would be usurious under the laws of several states, and hence unenforceable, but that would

not violate those state's *criminal* usury laws. For example, in 1970, when RICO was enacted, New York's interest ceiling was 7.5%, N.Y. Gen. Oblig. Law § 5-501, Banking Board General Regulation, Part 4, § 4.1 (McKinney Supp. 1969-1970); a rate of 15% would thus have been usurious and unenforceable; and a loan charging 15% interest could have been an unlawful debt within the meaning of that section. Yet there could have been no conviction on the basis of that loan because an interest charge did not violate the state's criminal usury laws unless the rate exceeded 25%. N.Y. Penal Law § 190.40 (McKinney 1967). *See also* Fla. Stat. §§ 687.03, 687.04, 687.07 (1966) (unenforceable if more than 10%, criminal if more than 25%); Mich. Comp. Laws Ann. §§ 438.31, 438.32, 438.41 (West 1970) (unenforceable if more than 7%, criminal if more than 25%). If, therefore, there were a requirement that a civil RICO plaintiff seeking redress for collection of a usurious loan prove that the defendants had been convicted of usury, it is apparent that some of the loan transactions that Congress intended § 1961(6) to reach would be immunized.

Accordingly, we conclude that the *Sedima* ruling that a civil RICO claim based upon racketeering activity requires proof of a prior conviction does not apply to a civil RICO claim based upon the collection of a debt characterized by § 1961(6) as unlawful because it is usurious.

On the other hand, the rulings in *Sedima* and *Bankers Trust* that a civil RICO plaintiff must show that the proprietary injury for which it seeks recovery was caused by a violation of § 1962 are plainly applicable to counts 1, 3, and 5, for § 1964(c) does not by its terms distinguish between actions based on alleged racketeering activ-

ity and those based on collection of an unlawful debt. In the present case, counts 1 and 3 invoked §§ 1962(a), (c), and (d); count 5 invoked §§ 1962(c) and (d). In the context of the allegations made here, therefore, success on these counts would require proof that, *inter alia*, (1) there was a RICO enterprise, (2) its activities affected interstate commerce, (3) the individual defendants were employed by or associated with the enterprise, (4) the Bank used, in the operation of the enterprise, income derived from the collection of unlawful debt, and (5) the individual defendants participated in the conduct of the affairs of the enterprise through collection of unlawful debt. 18 U.S.C. § 1962(a) and c). In addition, to prove that what was collected was an unlawful debt within the meaning of RICO, Durante would have to show that (6) the debt was unenforceable in whole or in part because of state or federal laws relating to usury, (7) the debt was incurred in connection with "the business of lending money . . . at a [usurious] rate," and (8) the usurious rate was at least twice the enforceable rate. *Id.* § 1961(6). And Durante would have to show that (9) as a result of the above confluence of factors, (10) it was injured in its business or property. *Id.* § 1964(c).

Absent proof of any one of these ten elements, Durante could not succeed on count 1 or count 3; absent proof of any of the elements numbered 1-3 or 5-10, it could not succeed on count 5. These requirements have implications for both the statute of limitations question and the proceedings on remand.

B. *Statute of Limitations*

Since RICO does not contain its own statute of limitations, and there is no other apparently relevant

federal statute of limitations for RICO claims, the court was required to apply the most appropriate limitations period provided by state law. *See Board of Regents* v. *Tomanio*, 446 U.S. at 485; *Johnson* v. *Railway Express Agency*, 421 U.S. at 462. Here the district court dismissed counts 1, 3, and 5 on the ground that they were barred by the one-year statute of limitations found in CPLR § 215(6), which governs actions to recover any overcharge of interest or to enforce a penalty for such an overcharge. This was not the appropriate statute of limitations.

The above listing of elements that must be proven in order to establish civil RICO liability for collection of an unlawful debt makes clear that the civil RICO action is not simply an action to recover excessive interest or to enforce a penalty for the overcharge. RICO is concerned with evils far more significant than the simple practice of usury. Based on its findings that organized crime uses money gained through illegal activities such as loansharking to infiltrate legitimate businesses, Congress enacted RICO in an effort "to seek the eradication of organized crime in the United States . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) (Statement of Findings and Purpose), *reprinted in* 1970 U.S. Code Cong. & Ad. News 1073. Thus, the RICO provisions require proof of such matters as the use of the ill-gotten funds in the operations of an enterprise that affects interstate commerce and the fact that the debt was incurred in connection with "the business of" usury.

In contrast, a state law claim governed by § 215(6) could be established without proof of nine of the ten listed elements of the civil RICO claim. There being no state law analog to the present civil RICO claim, we conclude that the most appropriate state statute of limitations is that found in CPLR § 214(2), governing actions to enforce a liability created by statute. *Accord Compton* v. *Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984) (applying to civil RICO action California's limitation period for actions based on statute); *see also Klimczak* v. *Connrex Corp.*, 49 A.D.2d 1031, 1031-32, 374 N.Y.S.2d 497, 498 (4th Dep't 1975).

CPLR § 214(2) provides that actions brought to enforce a liability created by statute must be commenced within three years of the accrual of the cause of action. The present action was commenced in May 1980, less than three years after the last interest payment was made by Durante on the allegedly unlawful debt collected by the defendants. We therefore vacate the judgment insofar as it dismissed counts 1, 3, and 5, and remand those counts for further proceedings, as set forth below.

C. *Proceedings on Remand*

Many of the civil RICO elements listed in part III.A. 2. are relatively straightforward, and we conclude that, given the degree of liberal interpretation required by *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957), all were adequately pleaded. The complaint adequately described Flushing as an enterprise, within the meaning of RICO, whose activities affected interstate commerce; alleged that the Bank used income derived from its collection of usurious loans in the operations of its business, and that the individual defendants employed by the Bank partici-

pated in the collection of those usurious loans; and alleged that Durante had been injured in its property as a result of the collection of the usurious loans. The problematical question, in our view, is whether Durante can show that its loans were "unlawful debt" within the meaning of RICO, for to come within that section, the loan must not only have been usurious, it must have (1) carried twice the enforceable interest rate, and (2) been incurred in connection with "the business of" lending money at a usurious rate. 18 U.S.C. § 1961(6).

As to the first of these issues, the complaint appears to suggest obliquely, rather than to allege precisely, that the interest charged on loans to Durante was twice the enforceable rate. Thus, it described the principal of loans from Flushing to Durante and the principal on which Durante was required to pay interest; but it did not specify the rate of interest charged. In response to defendants' summary judgment motions, Durante asserted expressly that the Bank had charged Durante interest at twice the enforceable rate, but again it did not specify what rate it was charged. Apparently elaborating on its conclusory assertion, Durante stated that

> [t]he Bank engaged in the business of lending money at a rate usurious under State and Federal law by, among other things, requiring borrowers to purchase non-interest bearing certificates of deposit and charging for executives' time, legal fees and closing costs.

If, on remand, the court determines that the inclusion of such charges is the sole basis for the assertion that the loan to Durante carried twice the enforceable rate of interest, and, if under New York law, some of these charges are not properly characterized as interest in de-

termining whether a loan is usurious, *see King* v. *American Home Sales Corp.*, 15 A.D.2d 932, 932-33, 226 N.Y.S.2d 55, 56 (2d Dep't 1962), *aff'd*, 242 N.Y.S.2d 216 (1963), it would appear that counts 1, 3, and 5 may be subject to summary dismissal.

Perhaps more importantly, the complaint did not unequivocally allege that the defendants were in the business of making usurious loans. Rather, it alleged that "[t]he Bank . . . participated in a scheme or business of making or collecting usurious loans" (complaint ¶ 6), and that Farber and Gelman "caused the Bank to participate in a scheme or business of making or collecting usurious loans" (complaint ¶¶ 7, 8). Given the language and purpose of RICO, counts 1, 3, and 5 may well be vulnerable to summary disposition, for if Durante can show only that the defendants engaged in a "scheme," but not that they were in "the business of" making usurious loans, its proof will not satisfy the statute.

As discussed above, one of the impetuses for the enactment of RICO was the finding that organized crime, through the funds gained from such activities as loan sharking, was infiltrating legitimate businesses. The inclusion of "collection of unlawful debt" as a major predicate for RICO liability seems to have been an explicit recognition of the evils of loan sharking, and there is no indication that Congress was taking aim at legitimate banking institutions. Rather, the legislative history indicates that the purpose of requiring, in the definition of "unlawful debt," that the usurious rate be at least twice the enforceable rate was "to limit the effect of this definition to cases of clear 'loan-sharking,' " S. Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1969), and to "eliminate[] the possibility of 'inadvertent' usury," *id.* at 159.

The requirement that the loan have been incurred in connection with "the business of" making usurious loans seems aimed at the same goal, *i.e.*, the exclusion from the scope of the statute of occasional usurious transactions by one not in the business of loan sharking. As the legislative history indicates in discussing the concept of "pattern" of racketeering activity, "[t]he target of [RICO] is . . . not sporadic activity." *Id.* at 158. *Cf. United States* v. *Salinas*, 564 F.2d 688, 691 (5th Cir. 1977) (inferring that the reason Congress included "the business of" gambling in § 1961(6) "was that it sought to punish only large scale gambling operations involving 'organized crime' as contrasted with small time gambling."), *cert. denied*, 435 U.S. 951 (1978).

The complaint gives no promise that Durante will be able to establish that Flushing or the individual defendants were engaged in "the business of" making usurious transactions. Its allegation of "a scheme" or business was equivocal, and it contained no indication that defendants had engaged in any usurious dealing other than that described in the complaint. The factual record in the district court was not developed on this issue because defendants' motion for summary judgment on counts 1, 3, and 5 was limited to their statute of limitations defense and was granted on that ground. Durante thus apparently had no occasion to come forward with a substantial showing that the defendants were "in the business" of making usurious loans.

We would suggest that on remand, the district court be willing to entertain a new motion for summary judgment by defendants, focusing on the question of the engagement of the defendants in "the business of usury." If Durante cannot show that there is a genuine issue of

material fact as to that question, counts 1, 3, and 5 should be dismissed. We leave for determination by the district court in the first instance the precise parameters of "the business" of usury as intended by Congress in § 1961(6).

IV. Other Contentions

We have considered all of Durante's other contentions on appeal and have found them lacking in merit. None of them requires extended discussion.

A. *The Judgment NOV on Count 9*

Count 9 alleged that the Bank was liable to Durante for fraud on the basis of the false promise in October 1975 to lend Durante $100,000. Count 8 alleged that Farber was liable to Durante for fraud on the same basis. The jury found for Farber on count 8 but against the Bank on count 9. The district court granted judgment NOV because it concluded that (1) virtually all of Durante's evidence of fraud attributed the alleged misrepresentations to Farber; (2) the jury plainly found that evidence to be less than "clear and convincing," *see Ajax Hardware Manufacturing Corp.* v. *Industrial Plants Corp.*, 569 F.2d 181, 186 (2d Cir. 1977) (under New York law, fraud must be proved by clear and convincing evidence), *Manchel* v. *Kasdan*, 286 A.D. 483, 484, 144 N.Y.S.2d 694, 695 (1st Dep't 1955) (per curiam) ("the inference of fraud [must be] unequivocal"), *aff'd*, 1 N.Y.2d 734, 151 N.Y.S.2d 940 (1956); and (3) absent the misrepresentations attributed to Farber, there was insufficient proof from which the jury could properly infer fraud on the part of the Bank. Durante attacks the court's conclusion that the proof of non-Farber misrepresentations was insufficient and argues that even if the

court was correct in that conclusion it should have granted only a new trial and not judgment NOV. We are unpersuaded.

Our review of the trial record convinces us that the vast bulk of the proof as to misrepresentations in connection with the alleged October 1975 promise to lend, and as to Durante's reliance, charged those misrepresentations to Farber. The remaining evidence as to statements by other Bank officials, even viewed in the light most favorable to Durante and with all permissible inferences drawn in its favor, *Saloomey* v. *Jeppeson & Co.*, 707 F.2d 671, 677 (2d Cir. 1983); *Mattivi* v. *South African Marine Corp. "Huguenot"*, 618 F.2d 163, 167-68 (2d Cir. 1980), was woefully inadequate to support a claim of fraud. The district court did not err in concluding that, given the verdict in favor of Farber on count 8, the claim of fraud against the Bank had not been proven by clear and convincing evidence.

Having determined that the verdict against the Bank on count 9 could not have been rationally arrived at, the trial judge had discretion either to order a new trial or to enter judgment NOV. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2538, at 605-06 (1971). We see no abuse of discretion in his choice of the latter action. There was no error in the conduct of the trial that could have affected the jury's assessment of the case against Farber, and there was thus no reason to give Durante a second opportunity to prove its claim against the Bank.

B. *The Directed Verdicts*

Durante claims that the district court erred in not permitting counts 7 (conspiracy), 12 (duress), 16 (breach

of contract), and 17 (negligent misrepresentation) to go to the jury. We find no error.

Count 7 of the complaint charged Farber and Gelman with conspiracy to commit the acts alleged in counts 1 through 6. Those counts alleged that Farber and Gelman had entered into and acted in furtherance of a conspiracy to offset the Bank's anticipated losses on the Jerdar loans by making usurious loans to Durante. Count 7 added no new allegations to those of counts 1-6 except to reiterate that Farber and Gelman had conspired to commit the acts heretofore described. Count 7 was properly dismissed, either as duplicative of counts 1-6, or as failing to state a claim on which relief may be granted since New York law does not recognize a substantive tort of conspiracy, *Ahmed* v. *National Bank of Pakistan*, 572 F. Supp. 550, 554-55 (S.D.N.Y. 1983); *Powell* v. *Kopman*, 511 F. Supp. 700, 704 (S.D.N.Y. 1981); *ABKCO Industries* v. *Lennon*, 52 A.D.2d 435, 441, 384 N.Y.S.2d 781, 784 (1st Dep't 1976).

Count 12, charging that the 1976 mortgage agreement was void because of duress, was properly dismissed as a matter of law. In order to prevail on such a claim the plaintiff must show, *inter alia*, that it had available no legal remedies to avoid the duress, *Neuman* v. *Pike*, 591 F.2d 191, 194 (2d Cir. 1979); *First National Bank of Cincinnati* v. *Pepper*, 454 F.2d 626, 633-34 (2d Cir. 1972), and that it acted promptly to repudiate the contract, *Scientific Holding Co.* v. *Plessey, Inc.*, 510 F.2d 15, 23 (2d Cir. 1974); *see also International Halliwell Mines, Ltd.* v. *Continental Copper & Steel Industries*, 544 F.2d 105, 108 (2d Cir. 1976). Durante showed neither. There was no basis for inferring that, if the defendants' conduct was indeed improperly coercive, Durante could

not have resorted to legal process to enforce enforceable agreements or fend off unwarranted punitive actions by the Bank. Further, not having resorted to legal process, Durante did not promptly repudiate the 1976 mortgage agreement, but instead made payments on the mortgage until December 1977 and did not bring suit until mid-1980.

Count 16, which alleged that the Bank had breached its October 1975 promise to lend Durante $100,000, was properly dismissed for lack of proof that there existed an enforceable agreement. There is no enforceable agreement if the parties have failed to agree on all of its essential terms or if some of the terms are too indefinite to be enforceable. *Interocean Shipping Co.* v. *National Shipping and Trading Corp.*, 462 F.2d 673, 676 (2d Cir. 1972); *see Brookhaven Housing Coalition* v. *Solomon*, 583 F.2d 584, 593 (2d Cir. 1978). The proof adduced at trial was, " 'without weighing the credibility of the witnesses or otherwise considering the weight of the evidence,' " *Croce* v. *Kurnit*, 737 F.2d 229, 237 (2d Cir. 1984) (quoting *Simblest* v. *Maynard*, 427 F.2d 1, 4 (2d Cir. 1970)), insufficient to allow a reasonable juror to conclude that there was a meeting of the minds on all of the material terms of the alleged October 1975 agreement.

Finally, count 17, which alleged that employees of the Bank negligently misrepresented the Bank's willingness to lend Durante $100,000 in the fall of 1975 was properly dismissed because Durante failed to establish a special relationship between itself and the Bank such as to give rise to a duty to avoid such negligent misrepresentations. Under New York law, a plaintiff may not recover for negligent misrepresentation unless "the author is bound by some relation of duty, arising out of con-

tract or otherwise, to act with care if he acts at all . . . ." *White* v. *Guarente*, 43 N.Y.2d 356, 362-63, 401 N.Y.S.2d 474, 478 (1977); *accord Survey of New York Practice*, 56 St. John's L. Rev. 371, 410 (1982) ("[T]he imposition of a duty to speak carefully when the damages are limited to economic loss, requires proof of a special relationship between the parties sufficient to justify actionable reliance"). An ordinary creditor-debtor relationship between bank and customer does not create such a duty of care. *See Aaron Ferer & Sons* v. *Chase Manhattan Bank*, 731 F.2d 112, 122 (2d Cir. 1984). Where the alleged negligent misrepresentation was promissory rather than factual, liability has been imposed only where there was shown a special relationship or a breach of contract. *See Banker's Trust Co. of Western New York* v. *Steenburn*, 95 Misc. 2d 967, 991-93, 409 N.Y.S.2d 51, 66-67 (Sup. Ct. Chautauqua County 1978). *See also Coolite Corp.* v. *American Cyanamid Co.*, 52 A.D.2d 486, 488, 384 N.Y.S.2d 808, 810 (1st Dep't 1976) (denial of motion to dismiss upheld in part on basis that misrepresentations were not promissory but factual).

In the present case, no special relationship was shown between Durante and the Bank that could support a claim for negligent misrepresentation. Rather, as Durante's owner testified at trial, Durante was "trying to get more and more credit from the Flushing National Bank, *so eventually we could work . . . into* a regular banking relationship with the bank." (Emphasis added.) Further, the alleged misrepresentation here was of a promissory character; and, as discussed above, Durante failed to prove that there was a sufficient meeting of the minds to create any contractual relationship. In short, Durante failed to establish the factors that could have given rise

to a duty on the part of the defendants to avoid the negligent misrepresentation it alleges.

Durante's reliance on *Mallis* v. *Bankers Trust Co.*, 615 F.2d 68, 81-83 (2d Cir. 1980), *cert. denied*, 449 U.S. 1123 (1981), for the proposition that no special relationship need be shown is misplaced. In *Mallis*, the misrepresentation was purely factual, relating to whether there was a restriction on the negotiability of certain unregistered stock. Durante has called to our attention no New York case, and we are aware of none, ruling that liability may be imposed on a defendant for a negligent promissory misrepresentation that could not give rise to liability for either fraud or breach of contract, where there was no special relationship between plaintiff and defendant.

C. *Assertions of Trial Error*

Durante contends that the court improperly excluded three lines of material evidence at trial. We disagree. The proffered testimony of Daniel Palmieri was properly excluded because it was based on his conversations with Durante. He had no first hand knowledge of the facts sought to be introduced and hence his testimony was excludable on hearsay grounds. The exclusion of the proffered documentation and expert testimony as to the regulation of Flushing by the Comptroller of the Currency was not an abuse of the trial court's discretion, granted by Fed. R. Evid. 403, to exclude evidence whose tendency to introduce extraneous or distracting matter, or otherwise to prejudice, outweighs its probative value. Finally, the evidence proffered as to profits allegedly lost by Durante years after the Bank's alleged breach of its agreement to lend Durante $100,000, and as to Durante's legal expenses in the intervening years, principally in

connection with matters not involving the Bank, was properly excluded on the ground that the claimed items of damage were too remote to be recoverable.

Nor do we find any error in the trial court's instructions to the jury. The court gave all required instructions and, taken as a whole, the charge was unlikely to have misled the jury as to the applicable law, or Durante's contentions, or the interrelation between the two. *See Evans* v. *Transportacion Maritime Mexicana SS "Campeche"*, 639 F.2d 848, 860 (2d Cir. 1981).

CONCLUSION

The judgment of the district court is vacated insofar as it dismissed counts 1, 3, and 5 of the complaint, and the matter is remanded for further proceedings on those counts. In all other respects, the judgment is affirmed. Each party shall bear his or its costs on this appeal.

Jurisdiction is retained in the Court of Appeals.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DURANTE BROS. AND SONS, INC.,

Plaintiff,

-against-

FLUSHING NATIONAL BANK, JACK FARBER and RICHARD GELMAN,

Defendants.

----------X

80 C 1385
MEMORANDUM AND ORDER

BELDOCK LEVINE & HOFFMAN
(Melvin L. Wulf, Jon B. Levison, Helene Fromm, Esqs., of counsel)
New York, New York
for plaintiff

SHEA & GOULD
(Milton S. Gould, Fran M. Jacobs, Peter C. Neger, Esqs., of counsel)
New York, New York
for defendants

NICKERSON, District Judge

Plaintiff, a New York corporation, brought this action against Flushing National Bank (the Bank) and two of its officials, claiming viola-

tions of Title IX, Racketeer Influenced and Corrupt Organizations, of the Organized Crime Control Act of 1970 (the Act), 18 U.S.C. §§1961 et seq., the Federal banking laws, 12 U.S.C. §§1 et seq., and New York state law.

Defendants moved for summary judgment on six of the seventeen counts in the amended complaint, urging that (1) counts one, three and five are barred by the statute of limitations, (2) counts two and four, alleging violation of four federal banking law provisions, are either time barred or do not afford a private right of action, and (3) count six fails to state a claim under the Act. The other eleven counts assert pendent state claims that defendants say should not survive dismissal of the federal claims.

The facts underlying the first count are, according to plaintiff, in substance the following. Commencing evidently in 1973 the plaintiff and Bank had a borrowing relationship on an unsecured basis. In that year the Bank also lent Louis Durante, Sr., (father of John Durante, plaintiff's president and sole shareholder) $41,800 to invest in a real estate venture by Jerder Realty Services, Inc. (Jerder), a New York corporation, and charged an usurious rate of interest. In November 1974 defendant Farber, the Bank's chief executive, director and controlling shareholder, got the Bank to make Jerder a $200,000 mortgage loan, and personally guaranteed it in return for a $100,000 investment in Jerder calling for specified future returns.

After November 1974 the Bank made further loans to Jerder up to the federal lending limit. Then Farber had the Bank make loans to a partnership composed of Jerder's principals including himself and Louis Durante, Sr., the funds to be used as capital for Jerder.

By July 1975 the Bank's unsecured loans to plaintiff totalled $142,500. In that month plaintiff bought a real estate parcel (Parcel A) in Brooklyn, and in October 1975 requested from the Bank a $100,000 mortgage loan to make the purchase of a continuous parcel (Parcel B). At that time Jerder was in financial difficulty, and its loan payments to the Bank were past due.

When defendants received plaintiff's request they evolved a fraudulent scheme to defraud plaintiff and to offset the Bank's and Farber's

anticipated losses on the Jerder loans. Pursuant to the scheme defendants falsely represented that the Bank would make the $100,000 mortgage loan to plaintiff. In reliance on this representation plaintiff got short term, thirty day financing, pledging its accounts receivable, and bought Parcel B for $142,500 on December 12, 1975. Defendants knew that plaintiff's business would suffer unless it could replace the short term financing with a mortgage loan.

On December 18, 1975 defendants told plaintiff that the Bank would not make the $100,000 mortgage loan. Further, defendants said they would require immediate payment of plaintiff's unsecured loans of $142,500 (which had theretofore been regularly extended) unless plaintiff gave the Bank a second mortgage in that amount

on Parcel A, guaranteed by the Durantes and others. On the same day the plaintiff executed the second mortgage. Plaintiff repaid the short term financing with funds it otherwise could have used in its business.

On February 24, 1976 defendants coerced John Durante to have plaintiff pay the Bank the $41,800 owed to it by Louis Durante, Sr., by increasing the mortgage by that amount and giving the Bank a first mortgage on Parcel B and a second mortgage on Parcel A in the total amount of $181,925. On March 10, 1976 plaintiff executed a consolidated mortgage for that amount covering both parcels. The Bank charged plaintiff exorbitantly for the time spent by the bank's officials and for legal fees and closing costs. These charges and the $41,800 were therefore criminally usurious interest

on the original loans to plaintiff of $142,500.

On April 26, 1976 the Bank, claiming default, brought an action in state court to foreclose the consolidated mortgage. That action has been stayed pending termination of this action.

The first count concludes that defendants willfully violated the Act, 18 U.S.C. §1962, in that the Bank derived income through collection of an unlawful, usurious debt and used the income in its operation, and defendant officials participated in the collection of the unlawful debt and conspired to that end.

The second count repeats the allegations of the first and concludes that the individual defendants violated federal law by (a) causing the Bank to charge interest made usurious

by 12 U.S.C. §85, (b) making false entries in the Bank's books in violation of 18 U.S.C. §1005, (c) furnishing false reports to the Comptroller of the Currency (the Comptroller) as to the Bank's condition in violation of 12 U.S.C. §161, and (d) making false statements to influence the Bank's action on the consolidated mortgage in violation of 18 U.S.C. §1014.

The third count repeats all previous allegations and asserts that starting April 6, 1976 through 1977 the Bank extended overdraft privileges to plaintiff and received, with the participation of the defendant officials, usurious interest in violation of the Act, 18 U.S.C. §1962.

The fourth count alleges that in connection with the receipt of interest on the overdrafts defendant

officials violated the same laws as are referred to in the second court.

The fifth count alleges that by commencing the foregoing action in April 1978 defendants violated the Act by collecting an unlawful debt, 18 U.S.C. §1962.

The sixth count alleges that, in order to execute their scheme to defraud, defendants caused to be mailed to plaintiff during the period January 1976 through February of 1978 monthly bank statements of account at the Bank and on March 20, 1978 a letter, thus engaging in a pattern of racketeering activity in violation of the Act, 18 U.S.C. §1962.

I

Defendants argue that counts one, three and five are time barred. All three counts claim a violation of the Act in that the Bank received income

derived from "collection of an unlawful debt" and used the income in the Bank's operation, or that defendant officials participated in the Bank's collection of an unlawful debt or conspired to do so.

In 18 U.S.C. §1962(a) the Act makes it unlawful for a person to use income in the operation of an enterprise affecting interstate commerce where the income is derived either (i) "from a pattern of racketeering activity" (including various statutory frauds as defined in 18 U.S.C. §1961(1)(B)) or (ii) "through collection of an unlawful debt." The Act also prohibits participation by a bank employee in either of those types of violations, 18 U.S.C. §1962(c), or a conspiracy to commit them, 18 U.S.C. §1962(d). Under 18 U.S.C. §1964 a person injured by a violation of

section 1962 may sue for threefold damages, plus costs and attorneys fees.

The Act thus makes illegal two different kinds of activities pertinent to the claims in the amended complaint. One kind is engaging in "a pattern of racketeering activity," as exemplified by the alleged mail frauds set forth in count six. The other is the "collection of an unlawful debt," as claimed in counts one, three and five. The question raised by defendants' motion as to those three counts is what limitation period applies to a claim based on the Act's prohibition against collection of an unlawful debt.

The parties agree that since the Act contains no limitations period, the court must look to the most analogous New York State statute. Defend-

ants point to section 215(6) of the New York C.P.L.R., requiring "an action to recover any overcharge of interest or to enforce a penalty for such overcharge" to be brought within one year. This action was brought on May 21, 1980, more than two years after the last interest payment on the consolidated mortgage on December 19, 1977. To the extent that plaintiff was injured by the payment of usurious interest and seeks to recover that interest, and a penalty for the overcharge, the claim falls squarely within the language of C.P.L.R. §215(6).

Plaintiff argues, however, that the three counts allege more than a usury claim, that the collection of usurious interest was only part of a scheme to defraud embracing other elements, and that therefore the court

should apply the six year statute contained in C.P.L.R. §213(8), providing that "an action based on fraud" must be commenced within six year.

Plaintiff's assertions of fraud do not alter the federal predicate on which the three counts rest, namely, the Act's prohibition against the "collection of an unlawful debt." The addition of allegations of false representations to a claim based on such a predicate does not transmogrify the claim into one "based on fraud." The nature of the claim is determined by the law which gives rise to it. The fraud allegations, while pertinent to the claim in count six of "racketeering activity," are superfluous to a claim for "collection of an unlawful debt."

This court does not read McNellis v. Raymond, 420 F.2d 51 (2d Cir.

1970), as requiring application of the six year fraud limitation. There the "basic theory" for the claim of a bankruptcy trustee to recover payments of a bankrupt to a creditor was that the payments were fraudulent because made without consideration while the debtor was insolvent.

Plaintiff says that the Act's explicit grant of a civil remedy, including threefold damages and attorney's fees, bespeaks a broad national purpose to drive corruption from the marketplace, an end which should be advanced by choosing a longer limitation period. No doubt when Congress has provided no federal statute of limtations and has left the matter to the analogous state law, there may be instances in which the state has permitted so short a time to bring suit as effectively to frustrate

federal policy. In such cases it may be fair to imply a congressional purpose to allow a longer period. Johnson v. Railway Express Agency, Inc., 421 U.S. 463, 465 (1975).

But there is no reason to suppose that Congress believed one year to be an unreasonably short period to sue to recover an overcharge of interest or a penalty for the overcharge. And in this case plaintiff was clearly not without sophistication. There is no suggestion that it did now know what interest it was payng, was in doubt as to the nature of the banking transactions into which it entered, or lacked access to legal counsel. In fact the amended complaint is full of allegations that plaintiff felt aggrieved and coerced by the actions of the Bank.

There is no merit to plaintiff's argument that if the six year fraud limitation in C.P.L.R §213(8) does not govern, the court should adopt the three year period of C.P.L.R. §214(2), applicable to actions "to recover upon a liability, penalty or forfeiture created or imposed by statute." Plaintiff's brief quotes only this part of the section and omits the concluding words: "except as provided in sections 213 and 215."

Counts one, three and five are barred by C.P.L.R. §215(6).

II

Counts two and four allege violations by the individual defendants of four federal statutory provisions.

A.

The first is 12 U.S.C. §85, which establishes the maximum interest rate a national bank may charge. The

counts assert that Farber caused the Bank to charge interest in excess of this maximum. Defendants contend that the exclusive remedy for a violation of the section is a suit against the Bank under 12 U.S.C. §86, which permits the person who has paid the excess interest to bring an action to recover from the Bank twice the amount of the interest thus paid, "[p]rovided, that such action is commenced within two years from the time the usurious transaction occurred." Here, of course, more than two years elapsed before suit was brought.

Plaintiff urges that the remedy afforded by 12 U.S.C. §86 against the Bank does not preclude an action against the Bank's directors under 12 U.S.C. §93. That section provides that if the directors of a national bank knowingly violate "any of the

provisions" of the chapter 2 of the federal banking law (which includes 12 U.S.C. §85), the bank's franchise shall be forfeited if the violation is determined in a suit brought by the Comptroller, and in cases of "such violation" every director who participated in it shall be held liable for all damages which the bank, its shareholders, "or any other person" shall have sustained "in consequence of such violation."

The court need not decide whether 18 U.S.C. §86 precludes an action against a director of the Bank to recover usurious interest charged by it. As noted above, 12 U.S.C. §93 contains no statute of limitations. Even if the section permits plaintiff to maintain a claim for a violation of 12 U.S.C. §85, the court must refer to the analogous state limitation. For

the reasons stated in the discussion of counts one, three and five the claim against Farber to recover damages arising out of payment of usurious interest is barred by C.P.L.R. §215(6).

B.

In counts two and four plaintiff also seeks damages against both individual defendants for violation of two criminal provisions, 18 U.S.C. §1005 and 1014. Section 1005, in pertinent part, makes it a crime for an officer or director of a national bank to make "any false entry in any book, report or statement" of the bank "with intent to injure or defraud such bank, or any other company." Section 1014, so far as relevant, makes it a crime for anyone knowingly to make "any false statement" for the purpose of "influencing in any way the action" of a

national bank on any application or loan.

Plaintiff bases its claim for damages for violation of these two provisions on 12 U.S.C. §503. That section recites, in substance, that a director or officer of any national bank who knowingly violates any of the provisions of, among other sections, 18 U.S.C. §§1005 and 1014 shall be personally liable for "all damages" which the bank, its shareholders, "or any other person" shall have sustained "in consequence of such violation."

This language of 12 U.S.C. §503 makes it clear that plaintiff may sue the individual defendants for alleged violations of 18 U.S.C. §§1005 and 1014, provided the damages are "in consequence" of the violations. The "consequences" of any given event are, in a literal sense, innumerable.

Causation is a web not a chain, Schwimmer v. Sony Corp. of America, 471 F. Supp. 793, 795 (E.D.N.Y. 1979), aff'd, 637 F.2d 41 (2d Cir. 1980), and every act has some effect on myriads of other occurrences, many hardly to be anticipated in the common experience of humankind. The purpose of section 503 certainly could not have been to reach all of these. A pragmatic and in the end more or less arbitrary decision must be made as to where to draw the line, having in mind both the dominant purpose of the legislation and the consequences of extending liability beyond a given point. Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972).

The papers before the court do not establish the kind and degree of

causal connection between the alleged violations of 18 U.S.C. §§1005 and 1014 and the damages plaintiff claims. Before trial the court will require an offer of proof by plaintiff so that the court may decide whether the alleged damages could be deemed the "consequence" of the violations.

C.

The other statute which counts two and four allege the individual defendants violated is 12 U.S.C. §161. That provides, in pertinent part, that a national bank shall make certain reports, verified and attested by certain officers and directors, to the Comptroller. Counts two and four assert that Farber caused the Bank to file false reports.

Plaintiff also bases this claim on 12 U.S.C. §93, discussed above, and says that plaintiff is an "other

person" who has sustained damages "in consequence of" the participation by the individual defendants in filing reports with the Comptroller.

Defendants argue that only the Comptroller has standing to sue for violation of 12 U.S.C. §161, and indeed, as recited above, 12 U.S.C. §93 provides that a violation by directors of provisions of the applicable banking laws shall be determined in a suit brought by the Comptroller, "[a]nd in cases of such violation" a director who participated in the violation shall be liable for the damages sustained by the bank, its shareholders, or any other person "in consequence of such violation."

One possible reading of the section would be to require a successful suit by the Comptroller before actions by others could be instituted.

But the courts have not so construed the language and have permitted shareholders to sue for a violation of 12 U.S.C. §161 before the Comptroller has prevailed. See Chesbrough v. Woodworth, 244 U.S. 72 (1916). If an injured "shareholder" may sue, so too may "any other person," provided that the person sustains damages "in consequence of such violation."

It is reasonable to say that a shareholder, such as the plaintiff in the Chesbrough case, who relied to his detriment on a false report to the Comptroller, sustained damage "in consequence of" the violation. The injury was immediately and directly the result of the false report. It is more difficult to see why plaintiff's alleged damages should be thought "in consequence of" the alleged false reports. Plaintiff is not said to

have relied on the reports, and presumably its alleged damages stemmed from the failure of the Comptroller to take such action as he might have, had accurate reports been filed. However, the court will not determine the question before an offer of proof by plaintiff.

III

Count six alleges that, in order to execute the scheme to defraud, defendants mailed bank statements of plaintiff's accounts from January 1976 through February 1978 and a letter dated March 20, 1978, asking John Durante to arrange a time to meet with the Bank officials to "come to some conclusions" as to plaintiff's dealings with the Bank.

Plaintiff says that by mailing these items and a demand letter of January 11, 1978 preparatory to bring-

ing the foreclosure action, defendants participated in "a pattern of racketeering activity." Under 18 U.S.C. §1961(1) "racketeering activity" includes any act indictable under 18 U.S.C. §1341 (the so-called mail fraud statute), and a "pattern of racketeering activity" means the commission within ten years of at least two acts indictable under various statutes including the mail fraud statute.

Defendants urge that the mailings of the bank statements and the letters were not "for the purpose of executing" the scheme as the mail fraud statute, 18 U.S.C. §1341, requires. According to defendants the bank statements merely memorialized the transactions that had taken place in plaintiff's account for the preceding month and could have no effect on the

success or failure of the alleged scheme.

Whether the mailings were part of an attempt to collect loans which plaintiff alleges it was fraudulently induced to assume is a question of fact which this court cannot decide on a motion for summary judgment. If plaintiff can establish that the mailings were part of such an attempt, the jury would be entitled to find that they were made for the purpose of executing the alleged fraud. United States v. Maze, 414 U.S. 395, 400 (1974); United States v. Marando, 504 F.2d 126, 130 (2d Cir. 1974).

Defendants urged in their initial brief that no claim under the Act exists where plaintiff does not allege that defendants are tied to organized crime. Subsequently the Court of Appeals for the Second Circuit in Moss

v. Morgan Stanley Inc., F.2d , No. 83-7120, slip op. at 6342 (2d Cir. Sept. 9, 1983), said that the language of the statute did not premise a violation of the Act on proof of a connection with organized crime. While this was dictum, it was carefully considered, and this court treats it as binding.

IV

Defendants' motion to dismiss counts one, three and five and those parts of counts two and four which allege violations of 12 U.S.C. §85 is granted. The motion is otherwise denied. So ordered.

Dated: Brooklyn, New York
September 27, 1983

/s/
Eugene H. Nickerson,
U.S.D.J.

The Clerk shall make copies of this memorandum and order and serve it upon the parties.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DURANTE BROS. AND SONS, INC.,

Plaintiff,

-against-

FLUSHING NATIONAL BANK, JACK FARBER and RICHARD GELMAN,

Defendants.

----------X

80 C 1385
MEMORANDUM AND ORDER

BELDOCK LEVINE & HOFFMAN
(Melvin L. Wulf, Jon B. Levison, Helene Fromm, Esqs., of counsel)
New York, New York
for plaintiff

SHEA & GOULD
(Milton S. Gould, Fran M. Jacobs, Peter C. Neger, Esqs., of counsel)
New York, New York
for defendants

NICKERSON, District Judge

Defendant Flushing National Bank (the Bank) moves (1) pursuant to Rule 50(b) of the Federal Rules of Civil Procedure to set aside the jury ver-

dict of $175,000 against the Bank on the ground that the verdict cannot stand in the light of the verdict in favor of defendant Farber, or (2) in the alternative, pursuant to Federal Rule of Civil Procedure 59, for (i) a new trial on the ground that the court's charge did not sufficiently define the term "clear and convincing evidence" in describing the prerequisites to a finding of fraud, or (ii) a reduction of damages as excessive.

The court put to the jury questions whether the Bank and Farber had committed New York common law fraud and whether the Bank, Farber and defendant Gelman had violated the so-called RICO statute, 18 U.S.C. §§1961 et seq. On the RICO claim the jury found for defendants. On the fraud claim the jury found against the Bank but in favor of Farber, who was the

Bank's controlling shareholder and chief executive officer. The Bank argues that since plaintiff failed to prove it was defrauded by Farber, there is no basis for the verdict against the Bank, there being no evidence to support a finding of reliance on knowing false representations by any other employee of the Bank.

The great bulk of plaintiff's evidence in the record of almost 2800 pages and thousands of pages of exhibits concerned what plaintiff claimed was Farber's and the Bank's motive to deceive because of its "financial and legal exposure" in a real estate venture known as Jerder Realty Services, Inc. (Jerder) and in loans to Louis Durante, Senior (the father of plaintiff's president John Durante) and other Durante affiliates and to

Farber. Plaintiff claimed that because of a concern about potential action by the Comptroller of the Currency (the Comptroller) with respect to these loans and to concentrations in credit in the so-called Durante line (including loans to plaintiff Louis Durante, Senior and other affiliates), Farber and defendant Gelman concocted a scheme to defraud plaintiff. Plaintiff sought to prove that in order to alleviate the alleged concern about the Comptroller, Farber decided falsely to promise to loan plaintiff $100,000 to purchase a parcel of real estate (called Parcel B), knowing that in order to finance the purchase plaintiff would borrow short term funds at a high interest rate for an interim period until the bank loan closed. According to the plaintiff's theory,

Farber knew that this would soon place plaintiff in financial difficulties.

Farber supposedly knew that the Bank could then renege on the promise to make the loan and take advantage of the "financial squeeze" on plaintiff to force it to assume the Bank's outstanding $41,800 loan to Louis Durante, Senior, and to grant the Bank a consolidated mortgage on two parcels of real estate (Parcel A and Parcel B). This, according to plaintiff's theory, would mitigate the concern about the Comptroller. Plaintiff later did so assume the Louis Durante, Senior loan and execute the consolidated mortgage.

Plaintiff asserted that because it had to pay a high interest rate to its factor on the $100,000 loan and allegedly could get no other bank financing, plaintiff's financial

condition worsened over time, leading to eventual liquidation.

The court found plaintiff's case implausible and wholly unpersuasive but nevertheless left to the jury the questions noted above. The issue before the court is whether the verdict against the Bank can stand in the light of the verdict in favor of Farber.

Proof of fraud must be clear and convincing. The courts have used language to the effect that the inference of fraud must be "unequivocal," Pittsburgh Coke & Chemical Co. v. Bollo, 421 F. Supp. 908, 924 (E.D.N.Y. 1976), aff'd, 560 F. 2d 1089 (2d Cir. 1977), quoting Manchel v. Kasdan, 286 A.D. 483 (1st Dep't 1955), aff'd, 1 N.Y.2d 734 (1956), or that fraud is only "established" where "an unavoidable inference" results from the proven

facts, Altman v. Casale, 25 A.D.2d 877 (2d Dep't 1966), or that fraudulent acts cannot be based on "suspicion, conjecture, or doubtful inference." Harte & Co. v. Shayani, 33 Misc.2d 680 (Sup. Ct. N.Y. Co. 1962), aff'd, 20 A.D.2d 968 (1st Dep't 1964).

In the present case the verdict against the Bank may not stand unless at least there is clear and convincing proof that a false representation was made by a Bank officer or employee other than Farber to plaintiff, that the representation was knowingly false, and that plaintiff relied on the representation to its damage. Of course, if a Bank officer other than Farber told another employee to make a representation to plaintiff and the officer knew the representation was false and would be relayed to and relied on by plaintiff, the Bank could

not escape liability because the employee had no intent to deceive. Magnaleasing, Inc. v. Staten Island Mall, 563 F.2d 567 (2d Cir. 1977).

It is, of course, clear that the jury's verdict absolving Farber of fraud means that the verdict against the Bank cannot be justified on the basis of any representations made to plaintiff by him. Quirby v. Morrow, 340 F.2d 584 (2d Cir. 1965); Stivers v. George Washington University, 320 F.2d 751 (D.C. Cir. 1963); Pangburn v. Buick Motor Co., 211 N.Y. 228 (1914); Goines v. Pennsylvania Railroad Co., 3 A.D.2d 307, 309, 310 (1st Dep't), reh. denied, 4 A.D.2d 831 (1957); Dirsa v. Martuscello, 76 A.D.2d 1020 (3rd Dep't 1980); Rabinowitz v. 2171 Food Corp, 12 A.D.2d 321, 322-23 (1st Dep't 1961). Decisions approving inconsis-

tent verdicts in criminal cases are plainly not in point.

The question thus is whether, taking all the evidence except Farber's alleged statements and construing it most favorably to plaintiff, there is proof justifying the unequivocal or unavoidable inference of fraud which the pertinent decisions require.

It is appropriate to start with the sworn statement of John Durante, the president of plaintiff and the person whom plaintiff claimed was deceived. That statement, in substance, makes the following recitations. In September 1975 Durante wished to purchase Parcel B for plaintiff. The seller was insisting on an early closing. Since plaintiff was not in a position to make the purchase without financing, Durante invited

Farber to inspect the property "for purposes of obtaining bank financing to purchase it." Farber and Durante discussed the fact that the Bank could not process the mortgage in the time required to make the purchase. Durante therefore asked Farber whether, if plaintiff bought the land with a short-term loan from its factor secured by accounts receivable, the Bank would replace the short-term loan with a $240,000 mortgage loan secured by a second mortgage on another piece of property that plaintiff had bought from the factor, Parcel A. Farber assured Durante that the Bank would do so and "encouraged" Durante to buy the property on those terms. Durante and Farber then made "a 'hand shake' deal."

The statement concludes: "I trusted Farber and knew that he con-

trolled the bank. I felt secure that [plaintiff] Durante Bros. would receive the mortgage financing as Farber represented. As a result of, and relying upon Farber's representations, Durante Bros. made interim arrangements with its factor, Gibraltar, for a short-term loan secured by Durante Bros.' accounts receivable" (Transcript 2450).

The court has examined the transcript and the exhibits with care and finds no evidence that Durante claimed to have relied on the representations of anyone other than Farber in contracting to purchase Parcel B or in borrowing from the factor to complete the purchase. Indeed, Durante testified that when he was advised by his attorney that the Bank was proposing a change in the mortgage arrangements Durante reported this to Erwin

Bleiweiss, the Bank officer who serviced plaintiff's account but who had no authority to make loans. Bleiweiss told Durante to "check" with Farber. Durante claimed that he called Farber who said an appraisal of Parcel B was needed and ended the conversation as follows: "Johnny, don't worry about it. It's just banking procedure. You'll have your closing on property B for the $100,000, the first mortgage." Durante then says he responded "Okay, fine" (Transcript 173-74). Durante's testimony at trial confirmed that the promise he claimed to have before he contracted to buy Parcel B was from Farber (Transcript 569).

Similarly, Martin Goldhaber, plaintiff's comptroller, testified that when he talked with Bleiweiss in late November or early December 1975 as to whether the Bank's loan would be

forthcoming before the closing on the purchase of Parcel B, Bleiweiss replied that it required Farber's "Okay" (Transcript 1230). Durante certainly was under no misapprehension that Bleiweiss was authorized to commit the Bank to make the $100,000 loan for the purchase of Parcel B.

Durante asked him in January 1976 "what was going on" with the mortgage on Parcel B and the $100,000, and Bleiweiss replied that "it was going before the board of directors for approval" (Transcript 184).

The verdict against the Bank cannot be sustained on the theory that Farber may have led Bleiweiss to relay false representations to Durante. Cf. Magnaleasing, Inc. v. Staten Island Mall, supra. In the first place, there is nothing in the record to support such an inference. Moreover,

the verdict in favor of Farber refutes the theory. The charge to the jury permitted the jury to find against Farber if "he participated, directly or indirectly, in the representations" and the other elements of fraud were satisfied. (Transcript 2712).

Plaintiff's case was based on the claim that Farber knowingly made false representations to Durante, who relied on them to plaintiff's detriment. The jury rejected that claim. There is no clear and convincing evidence that any other employee of the Bank made knowing false representations on which plaintiff relied to its damage. The verdict cannot stand.

The court need not consider the other contentions advanced by the Bank.

The verdict is set aside. Judgment may be entered for defendants, with costs and disbursements.

So ordered.

Dated: Brooklyn, New York
January 17, 1984

/s/
Eugene H. Nickerson,
U.S.D.J.

NOTE: This order is to be mailed by movant to all counsel and pro se litigant immediately upon receipt.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DURANTE BROS. AND SONS, INC.,

Plaintiff,

-against-

FLUSHING NATIONAL BANK, JACK FARBER and RICHARD GELMAN,

Defendants.

----------X

80 C 1385
MEMORANDUM AND ORDER

BELDOCK LEVINE & HOFFMAN
(Melvin L. Wulf, Jon B. Levison, Helene Fromm, Esqs., of counsel)
New York, New York
for plaintiff

SHEA & GOULD
(Milton S. Gould, Fran M. Jacobs, Peter C. Neger, Esqs., of counsel)
New York, New York
for defendants

NICKERSON, District Judge

The court has considered plaintiff's motion for a new trial. The basic premise of the motion, namely, that the jury verdict was inconsis-

tent, is erroneous. Indeed, plaintiff earlier argued that there was adequate evidence to support the verdict against the Bank even though Farber did not perpetrate a fraud. While this court did not find that argument persuasive, the jurors may well have accepted it, albeit erroneously.

The court need not address the other contentions of defendants' counsel in opposition to the motion.

The motion is denied. So ordered.

Dated: Brooklyn, New York
March 14, 1984

/s/
Eugene H. Nickerson,
U.S.D.J.

NOTE: This order is to be mailed by movant to all counsel and pro se litigant immediately upon receipt.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Eastern 80CV1385 Nickerson

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of February one thousand nine hundred and eighty-five.

Present: HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
HON. AMALYA L. KEARSE

Circuit Judges

84-7221

DURANTE BROS. AND SONS, INC.,

Plaintiff-Appellant,

v.

FLUSHING NATIONAL BANK, JACK FARBER and RICHARD GELMAN,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part and vacated and remanded in part to the said district court for further proceedings in accordance with the opinion of this court without costs to the parties.

Date of entry: February 5, 1985

ELAINE B. GOLDSMITH, Clerk

by: /s/ Edward J. Guardaro,
Deputy Clerk

A TRUE COPY
ELAINE B. GOLDSMITH

/s/_____
Clerk